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BEFORE THE ARIZONA CORPORATION COMMISSION
RECEIVED2 COMMISSIONERS3 MIKE GLEASON, Chairman
4 WILLIAM A. MUNDELL
5 JEFF HATCH-MILLER
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7 GARY PIERCE

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AZ CORP COMMISSION
DOCKET CONTROLArizona Corporation Commission
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FEB 15 2008

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8 IN THE MATTER OF THE APPLICATION OF
9 ARIZONA WATER COMPANY FOR AN
10 EXTENSION OF THE SERVICE AREA
11 UNDER ITS EXISTING CERTIFICATE OF
12 CONVENIENCE AND NECESSITY TO
13 PROVIDE WATER UTILITY SERVICES

DOCKET NO. W-01445A-03-0559

STAFF'S PRE-HEARING BRIEF AND
RESPONSE TO ARIZONA WATER
COMPANY'S MOTION TO STRIKE12 **I. INTRODUCTION**

13 In support of their respective positions, parties have docketed pre-filed testimony. Cornman's
14 pre-filed direct and rebuttal testimony discuss five issues: (1) grant of a CC&N in the absent
15 evidence of a current need and necessity; (2) grant of a CC&N without a property owner's request for
16 service; (3) preference of the property owner as to the service provider; (4) desirability of a single
17 service provider for a development or multiple service providers; and (5) the advantages of integrated
18 water and wastewater services over stand alone service. Pre-filed Direct Testimony of Jim Poulos
19 at 9. AWC's pre-filed direct testimony focused on whether AWC is a fit and proper entity to provide
20 water utility service to the area at issue. Pre-filed Direct Testimony of William Garfield at 3. In its
21 pre-filed rebuttal testimony, AWC disputed the applicability of the various issues raised in Cornman's
22 pre-filed testimony.

23 Staff believes that because Decision No. 69722 has confirmed that AWC has completely
24 fulfilled its requirements for holding the CC&N granted by Decision No. 66893, the scope of the
25 remand hearing ordered by Decision No. 69722 should be consistent with a deletion proceeding. The
26 standard governing deletion proceedings functionally directs the matters to be addressed in the
27 remand to whether AWC is presently willing and able to provide service at reasonable rates, or if
28 AWC is not fit and proper to hold a CC&N.

1 A further Procedural Order, dated February 12, 2008, directed Staff to respond to AWC's
2 Motion to Strike Cornman Tweedy's Irrelevant Testimony and Exhibits ("Motion to Strike").
3 Although Staff believes that the standards applicable to deletion proceedings govern the nature of the
4 remand proceeding, Staff also believes that granting the Motion to Strike would be inappropriate as
5 will be discussed further below.

6 II. DISCUSSION OF LEGAL ISSUES

7 *James P. Paul* sets out the relevant standard that governs deletion of territory from an existing
8 CC&N in the ordinary context. "Only upon a showing that a certificate holder, presented with a
9 demand for service which is reasonable in light of projected need, has failed to supply such service at
10 a reasonable cost to customers, can the Commission alter [the certificate holder's] certificate." *James*
11 *P. Paul Water Company v. Arizona Corporation Commission*, 137 Ariz. 426, 429, 671 P.2d 404, 407
12 (1983). That showing is made with evidence demonstrating that the certificate holder is either unable
13 or unwilling to provide service at reasonable rates. *Id.* at 431, 671 P.2d at 409. Insofar as the grant or
14 deletion of a CC&N requires an examination of the public interest, *James P. Paul* is clear that the
15 public interest requires that a certificate holder "retain its certificate until it is unable or unwilling to
16 provide needed service at a reasonable rate." *Id.* at 430, 671 P.2d at 408.

17 A great deal of pre-filed testimony provided by Cornman, however, appears to suggest that the
18 scope of hearing may contemplate issues not related either to the certificated provider's
19 responsiveness to the obligations of holding a CC&N (fit and proper entity) or to the economic
20 suitability of the particular provider. For example, Cornman raises issues relating to a current need
21 for service and the property owner's preference as to who the service provider will be. *See e.g.*, Pre-
22 filed Direct Testimony of Jim Poulos.

23 Decision No. 66893 articulated sufficient public interest bases for the grant of the original
24 CC&N subject to various conditions. The issuance of Decision No. 69722 determined the
25 satisfaction of those conditions. To the extent that the additional evidence Cornman proposes to offer
26 pertains to current need for service and property owner preference, these issues are relevant only to
27 the initial grant of a CC&N. The present remand is not for the purpose of determining what entity
28 should hold the CC&N. To the extent that the testimony largely goes to the point that the CC&N was

1 prematurely granted, *James P. Paul* states in FN 3 at 430, 671 P.2d at 408 that a decision to delete a
2 CC&N can be explained but not justified on that basis. Similarly, these additional issues Cornman
3 raises may provide a factual backdrop for the deletion proceeding but they are not of themselves
4 determinative of the matter at hand. "Though [premature grant of CC&N] may help explain the
5 Commission's treatment of this case, it does not justify the Commission's decision." *Id.*

6 To the extent that reasonableness of the rates for the service provided is an issue, testimony
7 relating to whether AWC's retention of a CC&N will have the effect of increasing the costs borne by
8 the ratepayers is clearly within the scope of a deletion proceeding. There is presently no active
9 application by an alternative provider for the same territory, however. Cornman's testimony
10 regarding the comparative cost advantages of integrated service providers over utilities that deal
11 exclusively in water or wastewater may have had relevance if the nature of this proceeding was in
12 fact a comparison of two utilities seeking to obtain the same CC&N territory.

13 *James P. Paul* clarifies that a distinction exists in the analysis of granting an initial CC&N
14 from a CC&N deletion analysis. Only in the initial CC&N grant is there any comparison of the
15 "capabilities and qualifications" of competing applicants. *James P. Paul* at 430, 671 P.2d at 408.
16 Cornman's pre-filed testimony regarding comparative cost advantages to utilities operating under an
17 integrated service model clearly attempts to distinguish AWC's service model as if this proceeding
18 were a competing CC&N application. *James P. Paul* is clear, however, that after grant of a CC&N,
19 the CC&N holder must be given an opportunity to respond to a reasonable demand for service, and
20 then fail to supply such service at reasonable cost before the CC&N can be altered. *Id.* at 429, 671
21 P.2d at 407.

22 Here, Cornman requests deletion from AWC's territory without allowing AWC to have an
23 opportunity to serve prior to the initiation of the deletion process. This raises the legal question, what
24 is the nature of the public interest inquiry governing a proceeding under these conditions. Ordinarily,
25 the only circumstance in which a deletion proceeding is posed to remove territory without giving the
26 certificate holder an opportunity to demonstrate competence is in the context of a complaint and order
27 to show cause why the certificate holder should possess any CC&N. In those circumstances, the
28 inquiry narrows to whether the public interest favors availing a deficient certificate holder of an

1 opportunity to cure deficient service or if the risk to the ratepaying customer outweighs the certificate
2 holder's interest.

3 Cornman's request for deletion is not premised on a present, harmful deficiency in service
4 provided by AWC. Essentially, what remains is whether the CC&N should not have been granted in
5 the first instance to AWC. As *James P. Paul* identified, it is insufficient to show that the public need
6 and necessity has not arisen yet as a basis for deleting a CC&N. *Id.* FN 3 at 430, 671 P.2d at 408. To
7 proceed with the deletion under the conditions Cornman requests would require more than mere
8 inconsistency of the initial CC&N grant with the public interest, but that the public interest is directly
9 confronted by the grant. In that vein, demonstrating that the public interest is against permitting
10 AWC to even begin providing service would require some showing that it is somehow incompetent to
11 hold any CC&N. Effectively this focuses the inquiry on whether AWC is fit and proper to hold a
12 CC&N.

13 **III. RESPONSE TO MOTION TO STRIKE**

14 In response to AWC's Motion to Strike, Staff believes it would be inappropriate to grant such
15 motion. Traditionally, the Commission offers an opportunity for all parties to present such evidence
16 as they believe relevant and helpful to their respective positions. The Commission specifically
17 desired that the remand proceeding be "broad in scope so that the Commission may develop a record
18 to consider the overall public interest underlying service to the Cornman property that is included in
19 the extension area granted by Decision No. 66893." Decision No. 69722 at 20. Further, Staff
20 believes that Cornman should have an opportunity to present the case they believe expresses their
21 position on the merits of the proceeding.

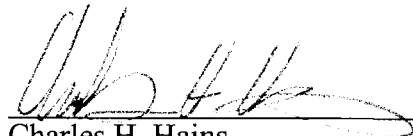
22 To the extent that the legal issues that govern the nature of this proceeding may have the
23 effect of focusing the factual inquiry, Cornman should have an opportunity to demonstrate that their
24 pre-filed testimony is relevant and addresses these legal issues. Indeed, it is difficult to conclude that
25 the testimony Cornman provided is precluded by the nature of the legal standard governing this
26 matter when the applicable legal issues are still being briefed. It would thus be premature to grant the
27 Motion to Strike.

28 ...

1 **IV. CONCLUSION**

2 Considering the circumstances and posture of the present proceeding and the extent of
 3 inquiries that the relevant case law permits in CC&N deletion proceedings, Staff believes that the
 4 nature of the proceeding will of necessity be narrower than the scope advocated by Cornman. Absent
 5 an opportunity for AWC to demonstrate that it is willing and able to respond to reasonable requests
 6 for service at appropriate rates, the sole justification for deletion of a CC&N under a public interest
 7 analysis is if AWC is simply not fit and proper to hold a CC&N. As Cornman is requesting deletion
 8 for only the portion of the CC&N extension territory that it occupies, this will likely prove difficult to
 9 demonstrate since it approves AWC to serve the remainder of the certificate area.

10 RESPECTFULLY SUBMITTED this 15th day of February, 2008.

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